



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.10.2007

Coram

The Honourable Mr.JUSTICE K.RAVIRAJA PANDIAN
and
The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN

Tax Case (A) No.45 of 2004

M/s. Madathil Brothers
158, Arcot Road,
Chennai - 600 026.

..

Appellant

versus

The Deputy Commissioner of Income Tax,
Special Range - VI, 122,
Uttamar Gandhi Road
Chennai - 600 034.

..

Respondent

Appeal under Section 260-A of the Income Tax Act against the order dated 31.12.2002 made in ITA No.569/mds/98 "C" Bench against the C.I.T (appeal) Order dated 9.12.1992 in ITA.No.30/93-91/comp, on the file of the Commissioner of Income Tax (Appeal) VII, Madras, against the assessment order dated 26.3.1990 on the file of the Deputy Commisisioner of Income tax, Special Range-VII, Madras.

For Appellant : Mr.V.S.Jayakumar

For Respondent: Mr.Murali Kumaran
Senior Standing counsel for Income Tax

J U D G M E N T

CHITRA VENKATARAMAN, J.

This Tax Case (Appeal) is preferred by the assessee against the order of the Income Tax Appellate Tribunal relating to the assessment year 1987-88.

2. In the grounds of appeal, the assessee raised five questions of law. Except the one on the question of capital gains arising out of the sale of an immovable property at 35, Nungambakkam High Road, Chennai, four questions of law were admitted by this Court under order dated 23.4.2004.



3. It is stated that subsequent to the disposal of the appeal, the applicant filed M.P.Nos.21 & 87 (MDS)/2003 before the Tribunal seeking a decision again on the question of capital gains arising thereon treated as a short-term gain and not a long term one. The appellant also sought for reconsideration on the question of loss arising from the film "Kasthuri Vijayam". By order dated 1.9.2003, the Tribunal allowed the M.P on the question of capital gains on the sale of the immovable property accepting the same as long-term capital gains. It is stated that the Revenue filed an appeal in Tax Case No.272 of 2004. By order dated 6.8.2004, this Court took the view that the order of the Tribunal granting the relief on capital gains amounted to review of the order earlier passed rejecting the said plea. This Court took the view that the Tribunal had no authority under law to review its order. Hence, in the said view of the matter, considering the prejudice that might be caused to the appellant herein on the question of capital gains on the sale of immovable properties, the appellant was permitted to raise the question on capital gains as a question of law for consideration along with other questions admitted earlier under order dated 23.4.2004.

4. Accordingly, the appellant filed T.C.M.P.No.50 of 2007 seeking the following question also to be raised to consider:

" Whether in law in holding that the capital gains arising on the sale of immovable property at 35 , Nungambakkam High Road is a short term capital gain and not a long term one?"

By order dated 14.8.2007, this Court ordered the T.C.M.P. Thus, the said question is also considered as part of the questions raised and admitted by this Court.

5. Hence, the questions of law that arise for consideration as admitted by this Court are as follows:

"1. Whether on facts and in the circumstances of the case, the Tribunal was right in law in rejecting the appellant's claim of loss arising from two movies by name "Kannamma" and "Uzaikum Karangal"?

2. Whether the Tribunal was right in holding that the sum of Rs.1,26,000/- is unexplained cash credit under Section 68 of the Income Tax Act, 1961?

3. Whether the Tribunal was right in law in upholding the disallowance of loss arising from "Kasturi Vijayam", without dealing with the said grounds of appeal?

4. Whether the Tribunal was right in disallowing the claim of loss of Rs.3,60,000/- arising out of sale of shares of M/s. Sudershan Clay and Ceramics Limited? 5. Whether in law in holding that the capital gains arising on the sale of



immovable property at 35, Nungambakkam High Road is a short term capital gain and not a long term one?"

6. The assessee is a firm engaged in the business of distribution and exhibition of films. It is stated that the appellant herein had purchased the negative rights of two feature films, namely, "Kannamma" and "Uzaikum Karangal" from its sister concern M/s.Kamakshi Agencies Private Limited for a consideration of Rs.5,76,000/- and Rs.12,01,000/- on 22.8.1986 and 7.10.1986 respectively. These two films were released as early as 1972 and 1976 respectively. The vendor, in turn, had purchased the rights in the year 1982 and 1983 respectively from another sister concern of the assessee, i.e., M/s.Sudarsan Agencies, which is the proprietary concern of M/s.Sudarsan Trading Company. It is stated that ever since the purchase of the two movies in 1982 and 1983, the vendor, M/s.Kamakshi Agencies Private Limited had not exploited these two movies in any manner and were shown as closing stock and opening stock every year till finally the negative rights were disposed of in favour of M/s.Ashoka Brothers, a unit of the assessee herein, in the year 1986. The assessee contended that as per the agreement entered into by the assessee, these two films were given to the mediators to exhibit the films in any particular area for a particular period and amounts were received thereon on the rights given. Admittedly, the assessee had not entered into any agreement with the exhibitors directly. The total collection made for exhibiting these two films through the mediators were stated to be to the tune of Rs.1.26 lakhs. The cost of these two movies and the income earned were debited to the Profit and Loss Account and the assessee has showed a net loss of Rs.20,68,830/-.

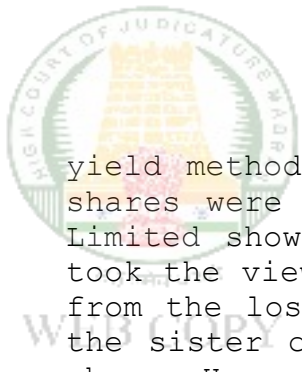
7. In the course of the assessment proceedings, the appellant was asked to show the necessary evidence as regards the exploitation through the mediators. The appellant herein produced confirmatory slips from different parties who had taken the films on hire, the amount of hire charges for the period for which they were screened, and the place of screening. In terms of the addresses given in the confirmatory slips, enquiries were made as to whether the assessee had actually engaged the mediators for the exhibition of the films. On enquiry, it was found that none of the parties mentioned in the confirmatory slips were found existing/or the addresses given were not found. There were instances where the assessee could not give full addresses of the persons who had claimed to have taken these films for hire. By letter dated 31.1.1990, the assessing authority called upon the appellant herein to identify the persons who were stated to have been given the exhibition rights and produce those parties for verification. In its letter dated 12.2.1990, the appellant replied that it had received the contracts only through the mediators and it had no direct contact with the exhibitors and that the films were given to the middlemen. Except for the confirmatory slips produced before the assessing authority as regards the receipt of film hire charges, no details were furnished by the appellant herein. On the other hand, the appellant stated that since the transactions had taken place well before 31.3.1987, it was not practically possible to produce



the mediators before the assessing authority. The General Manager of the appellant firm, the former Managing Partner, expressed his inability to give the details or identify the persons to whom the exhibition rights were given. He further stated that some of the middlemen approached him through some persons known to the appellant. The assessing authority noted that nothing further could be elicited from the General Manager of the firm Mr.C.V.Velayudham. In the face of total lack of evidence as regards the mediators and the exhibitors through whom the films were exhibited and in the absence of any material to substantiate the confirmatory slips, the assessing authority rejected the case of the appellant-assessee for treating the loss as a business loss. On the other hand, the assessing authority held that since the films purchased had not been exploited during the year, the entire cost of acquisition of the two films were allowed to be carried forward as per Rule 9-B(iv) of the Income Tax Rules, 1962. As regards the collection of Rs.1.26 lakhs for the exhibition of the movies, the assessing authority treated the same as unexplained cash credits under Section 68 of the Income Tax Act, 1961, on the premise that these monies were really that of the appellant's money introduced in the guise of the receipts from the exploitation of the films.

8. The second issue relates to the disallowance of loss arising from the film "Kasthuri Vijayam". It is stated that the said film was purchased by M/s.Ashoka Brothers under the banner "Moogambika Films". The negative rights were owned by the appellant-assessee firm. Since there was no collection forthcoming, a sum of Rs.1,53,534.57 was written off. The assessing authority took the view that as there was no credit of collection during this period, the said amount could not be written off under Rule 9-B.

9. On the next question as to the short term capital loss of Rs.3,60,000/- arising out of sale of shares purchased from its sister concern M/s.Sudarsan Clay and Ceramics Limited, it was stated that the appellant-assessee had purchased one lakh shares of Rs.10/- each on 3.10.1980. The shares were sold for a consideration of Rs.8,40,000/- on 20.1.1987. This was claimed as a short-term capital loss in the statement of accounts. The assessing authority pointed out that M/s.Sudarsan Clay Products was a losing company and the shares were originally transferred in the name of Mr.Velayudham, the Managing Partner and representative for and on behalf of the firm, and the company refused to register the shares in the name of the firm. Subsequently, the shares were sold by the appellant-assessee at the best available price considering the fact that the company was a loss making company. The appellant herein received Rs.6,00,000/- out of the total consideration of Rs.8,40,000/- and the balance of Rs.2,40,000/- was still outstanding. The assessing authority felt that the claim of short term loss had been deliberately incurred by the appellant herein to avoid the capital gains. It is an admitted fact that the company had not allowed any dividends at any point of time from 1983 onwards. It is also pointed out that whether the valuation was by the



yield method or under Rule 1D of the Wealth Tax Rules, the value of the shares were negative and the balance sheet of M/s.Sudarsan Clay Products Limited showed the value of the shares as 'nil'. The assessing authority took the view that there were no reasons stated for purchase of the shares from the loss making company and there was equally no reason assigned for the sister concern purchasing the shares from the assessee at Rs.7/- per share. Hence, there was no bona fide commercial principle involved in this transaction. Hence, the assessing authority held that it was only a colourable transaction to evade payment of income tax, which otherwise would be liable to be paid under the capital gains.

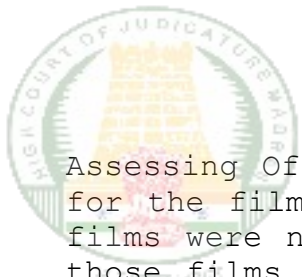
10. On the question of the claim for long-term capital gains on the sale of the immovable property at 35, Nungambakkam High Road, Chennai, the assessing authority applied the decision of the Hon'ble Supreme Court reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX) to hold that the original agreement of sale dated 16.9.1995 did not confer any title to the assessee that the sale deed was executed as per the memo of compromise entered into in the O.S. Appeal before the High Court on 9th July 1986; that the sale deed was registered in favour of the appellant-assessee only on 10.7.1986. Hence, till the sale deed was executed in favour of the appellant in the year 1986, the appellant did not have any title as an owner; consequently, the sale effected by the appellant on 26.9.1986 resulted in short-term capital gains only. The appellant-assessee did not hold the property for a period more than 36 months to treat the gain as long term capital gains.

11. Aggrieved by the order of the assessing authority, the appellant -assessee went on appeal before the Commissioner of Income Tax (Appeals). By an order dated 9.12.1992, the Commissioner of Income Tax (Appeals) dismissed the appeal, upheld the order of the assessing authority, thereby confirmed the assessment.

12. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the appellant-assessee preferred a further appeal before the Income Tax Appellate Tribunal. By an order dated 31.12.2002, the Tribunal rejected the appeal, thereby confirmed the findings of the authorities below. As against this order of the Tribunal, the appellant -assessee has preferred this appeal before this Court under Section 260-A of the Income Tax Act, 1961 on the grounds as stated above.

13. Heard counsel for the parties.

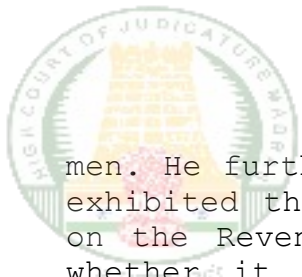
14. On the first question of claim of business loss on the exhibition of the films, a perusal of the order of the Tribunal shows the finding of fact that the assessee could not produce any evidence as to the identity of the middle men and the exhibitors. The parties issuing the confirmatory letters were also found as either not traceable or the addressees/address were not there. The Tribunal further pointed out to the finding of the



Assessing Officer that as there was no exhibition receipts, the write-off for the films could not be allowed. The Tribunal further found that the films were not exhibited for quite some time and there was no demand for those films. In the circumstances, the Tribunal upheld the order of the Commissioner of Income Tax (Appeals). The Tribunal further pointed out that Sri.C.V.Velayudham, who had himself signed on the contracts, refused knowledge about any of the alleged exhibitors. The Tribunal further stated that when the said Velayudham was a signatory to the documents, his plea that he had no knowledge about the same clearly showed that the explanation given could not be acted upon that the receipt of Rs.1,26,000/- represented collection on the exhibition of films. In the background of these facts, rightly, the Tribunal upheld the orders of the authorities below.

15. Learned counsel appearing for the appellant could not point out any error in the reasoning of the Tribunal, or for that matter, any of the authorities. Being a pure question of fact and appreciation of evidence and there being no material produced to point out any error in the findings of the Tribunal, we do not find any ground to disturb the findings. Hence, we reject the plea of the appellant-assessee on this issue.

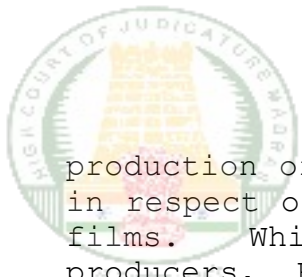
16. The assessing authority came to the conclusion that the appellant-assessee had no intention to exploit the films and these films were lying idle with the assessee's sister concern; that these films were purchased at a cost higher than what was paid by the sister concern. The Tribunal referred to the findings of the assessing officer that the idea of claiming loss was only to negate the capital gains incidence which the appellant-assessee had during this year. Hence, the plea of exploitation of the films through the mediators itself was a fabricated one. The Tribunal confirmed the findings of the assessing authority to hold that since the films were not exploited during the year, the entire cost of acquisition of these films were to be carried forward as per Rule 9-B(4). Touching on this, learned counsel appearing for the assessee took us through the provisions of Rule 9-A and 9-B of the Income Tax Rules, 1962, to impress on the submission that these Rules have relevance for the new films for exhibition. He submitted that the assessing authority erred in invoking Rule 9-B that the appellant could only have the benefit of carry forward of the loss as per Rule 9-B. He emphasized that Rule 9-B and Rule 9-A have to be read harmoniously to get at the intention of the Rules provided therein that at best, these Rules have relevance for new films alone and cannot be extended to films already released and exhibited and further sold to others for exploiting the rights. In the context of the submissions, learned counsel stated that the appellant-assessee would be entitled to have the adjustment under the regular provisions of the Act. Elaborating on the facts, he submitted that the appellant herein had, in fact, given the details as to the middle men through whom the films were given for exhibition before the assessing authority, and that by efflux of time, the assessee had difficulty in tracing the exhibitors or the middle



men. He further pointed out that when the details as regards those who had exhibited the films through the middle men were furnished, the burden is on the Revenue to make necessary enquiries to consider the claim as to whether it is a genuine transaction or not. In the context of the rejection of the claim for business loss and treating the sum of Rs.1.26 lakhs as 'unexplained cash credit', learned counsel referred to Section 68 of the Income Tax Act, 1961. He contended that when the assessee had discharged its burden and the amount was found in credit in the books of accounts maintained by the assessee and an explanation was offered as relating to the income earned on giving the films for exhibition through mediators, the assessing authority cannot invoke the provisions of Section 68 of the Income Tax Act, 1961, to treat the same as unexplained cash credit. Learned counsel further pointed out that the Section enjoins upon the assessing authority to record the satisfaction as to the materials given by the assessee before embarking on the provisions under Section 68 of the Income Tax Act, 1961. In the above circumstances, learned counsel submitted that the assessing authority failed to observe the provisions of Section 68 of the said Act and hence, to treat Rs.1.26 lakhs as an unexplained cash credit.

17. We do not agree with the aforesaid contentions by the learned counsel for the appellant-assessee herein. On the genuineness of the claim of the exhibition through the mediators, we have already rejected the plea of the appellant herein. As regards the contention as to the applicability of Section 68 treating the alleged exhibition receipts as cash credits, it must be seen that the primary onus as to the receipt of the said amount is on the appellant-assessee to show the identity of the exhibitors and the mediators and the genuineness of the transaction. Only where the assessee discharges the burden prima facie, that the burden shifts on to the revenue. The mere production of the confirmatory letters would not, by itself, prove the claim of the appellant as regards the exhibition of the films. Read in the context of the inability expressed by the assessee to bring the exhibitors before the assessing authority and considering the fact that the addressees were not there in the said address or the particulars were not correct, the view of the assessing authority could not be faulted with. It is no doubt true that law does not contemplate or require compliance of an impossible act. Yet, when the details regarding the particular receipt is exclusive to the knowledge of the assessee who has the necessary information relating to the same, the initial burden is certainly on the tax payer to discharge the same so that further enquiry thereon is taken to the logical end by the revenue. Going by the findings recorded by the Tribunal, we do not find any ground to accept the plea of the appellant-assessee in this regard.

18. On the question of the claim of loss and the applicability of Rules relating thereto, the amortization of costs of film either in the hands of the producer or the distributor is governed by Rules 9-A and 9-B of the Income Tax Rules, 1962. A cursory glance of these provisions show that Rule 9-A prescribes deductions in respect of expenditure on the

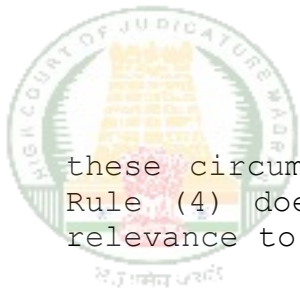


production of feature films. Rule 9-B deals with the deduction available in respect of expenditure on acquisition of distribution rights of feature films. While Rule 9-A concerns itself as to the case of the film producers, Rule 9-B is about film distributors, a stage after the production of the film. These Rules lay down the procedure for computing the profits and gains from film production and/or film distribution business.

19. Admittedly, the case herein relates to exhibition of old movies. Hence, going by the case of the appellant, the deduction falls for consideration only under Rule 9-B. The manner of allowing such a deduction is given in Sub Rule (2) to Sub Rule (4). The explanation to Sub Rule (1) to Rule 9-B defines the cost of acquisition. It states, the cost of acquisition in relation to feature film means the amount paid by the film distributor to the film producer or another distributor under an agreement entered into by the film distributor with such film producer or such other distributor as the case may be for acquiring the rights of exhibition expenditure. The provisions contained therein also stipulate the minimum period for which the film should have been exhibited for the purposes of gaining benefit under these provisions.

20. A reading of Rule 9-B(1) with the explanation thereon leaves no room for doubt that it intends to deal with films coming for exhibition after its release for the first time. The fact that it refers to "distribution from one distributor to another or from one distributor to such other distributors" clearly shows the futility in the contention of the learned counsel for the appellant to read this provision as relatable to new films and that there are no reference to relate the same to old films. In contrast to Rule 9-B, Rule 9-A shows that it relates to a new film. The Section deals with deductions in computing the profits and gains of production of feature films certified for release by the Board of Film Censors in terms of the provisions of Sub-Rule (2) to Sub Rule (4). A reading of the provisions clearly show the difference in the area of operation of the provisions of Rule 9-A and 9-B. In the circumstances, we do not find any justification to hold that invocation of Rule 9-B will not have any bearing to the case on hand. We agree with the Tribunal that the appellant-assessee is, at best, entitled to the cost of acquisition of these films to be carried forward as per Rule 9-B(4). Consequently, questions 1 and 2 raised are answered against the assessee appellant.

21. As regards the third question raised by the appellant herein on disallowance of loss arising from "Kasturi Vijayam", it may be noted that Rule 9-B(4) provides that in the event of the assessee not exhibiting the film on commercial basis or sell his rights of exhibition, thereby resulting in no deduction in respect of the cost of acquisition, the assessee is granted carry forward of the loss. Learned counsel for the assessee pointed out the provisions herein applied in relation to the assessment year 1987-88 that the provisions itself came to be effective on and from the assessment year commencing after 1.4.1987 (Sub Rule (7)). In



these circumstances, the question of construing any benefit as per Sub-Rule (4) does not arise. Consequently, he states that the Rule has no relevance to this case.

22. As already noted, Sub-Rule (7) makes provisions effective from 1.4.1987. The Rule itself was introduced for deduction in respect of expenditure on acquisition and distribution rights of the feature films under the Income Tax (Seventh Amendment) Rules, 1976. Learned counsel submitted that the normal Rule as regards the deduction have not been applied in this case. Learned counsel placed reliance on the decision of Jabalpur Bench of the Income Tax Bench reported in (1983) 5 ITD 142 in the case of ITO Vs. R.S. Enterprises, which was referred to before the Tribunal. The grievance of the appellant herein is that the Tribunal had omitted to consider this issue raised. However, learned counsel fairly stated that the Tribunal considered the claim in the M.P. filed after the disposal of the appeal only to reject the same once again.

23. A perusal of the order passed in M.P.Nos.21 & 87/03 dated 1.9.2003 shows that the Tribunal considered the claim and pointed out that the facts relating to the expenditure on the production of the films which was abandoned were not placed before the authorities at all for consideration.

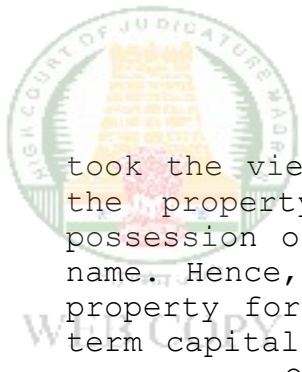
24. It is no doubt true that the relevant Rule pertaining to deduction comes into operation from 1.4.1987. It may be noted that the assessee, in its application filed before the Tribunal after the disposal of the appeal, stated that the film was abandoned during the accounting year 1987-88. The Tribunal pointed out that the contention that the film was abandoned during the year 1987-88 was not available in the petition to consider the contention that Rule 9-B itself is not applicable as regards the assessment year 1987-88. It may be noted that even before this Court, except for the mere contention that Rule 9-B will not be applicable, no facts are placed. As found by the authorities below, in the absence of any material to substantiate his claim of expenditure, we do not accept the plea of the assessee. The Tribunal pointed out that as regards this claim, there are no evidence placed before the Tribunal to show that the rights were abandoned, since there were no credit of collections. However, if the rights were purchased by the assessee and there were no collection, the provision that would be applicable would be Rule 9-B, which had been rightly applied by the assessing authority concerned. The Rule provides for deduction on certain basis. The deduction is available only subject to exhibition of films for particular number of days. In the absence of any details thereon, the claim of the assessee was rejected. While going through the order of the Commissioner of Appeals, it is seen that when the assessee was asked to show how he was entitled to write off the sum of Rs.1,53,534.57, it was stated that the assessee explained vide letter dated 15.2.1989 that the amount should be allowed under Rule 9-A and 9-B. If there are collections during the year, Rule 9-B expressly states that the same should be credited to the books of accounts of the



assessee and deduction granted in accordance with Rule 9-B. Since there was credit of collections during the year, the assessee was not permitted the write off by the assessing authority. Thus confirmed on factual aspect, we do not find any ground to interfere with the same in exercise of the jurisdiction under Section 260-A of the Income Tax Act, 1961. It may also be pointed out that the assessee had not denied the applicability of Rule 9B in the proceedings taken before the assessing authority or before the first appellate authority. In any event, on the view taken on facts and as to Rule 9-B and its applicability, we do not find any justification to accept the plea of the appellant herein. Hence the third question is answered against the assessee.

25. As regards the fourth question on the disallowance of the claim of capital loss of Rs.3.60 lakhs, the Tribunal has considered the claim in detail to arrive at the finding of fact that the purchase of shares was from a company which was economically not very sound. Learned counsel for the appellant submitted that the commercial decisions cannot be dissected to reject the claim of loss arising out of the sale of shares of M/s.Sudarsan Clay and Ceramics Limited. A perusal of the order of the Tribunal shows that whether it is by the application of break up value method or by yield method, the value of shares of M/s.Sudarsan Clay Products is shown as 'nil'; in fact it showed a negative figure for the years 1984-85, 1985-86, 1986-87 and 1987-88. In the face of full knowledge of the state of affairs of M/s.Sudarsan Clay Products, the Tribunal held that the whole transaction lacked rational commercial principles involved in this. Thus the Tribunal confirmed the finding that the appellant-assessee could not prove the genuineness of the transaction, that the claim of the short term capital gains was deliberately made by the appellant to avoid tax on capital gains. In the face of the findings of the Tribunal on this issue which could not be assailed by the appellant, we do not find any justification to interfere and hence, the same is rejected.

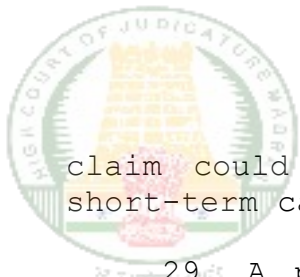
26. This takes us to the claim of long term capital gains arising on the sale of an immovable property at 35, Nungambakkam High Road, Chennai. It is seen that the appellant-assessee had an agreement for sale under document dated 16.9.1975 and the possession was handed over to the appellant herein on 1.1.1976. During the assessment year 1987-88, the appellant -assessee sold the property at Nungambakkam High Road for a sum of Rs.45 lakhs to one Kalpatharu Private Limited on 30.9.1986. It is stated that the sale deed in favour of the appellant-assessee was executed on 10.7.1986 by Velayudham and registered on 26.9.1986. The Assessing Authority took the view that since the appellant-assessee was in possession for a period of about two months, it is a short-term capital asset in terms of Section 2(42-A) of the Income Tax Act, 1961. The assessing authority thus took the view that the sale proceeds from the short-term capital asset should be assessed only as short term capital gains. Aggrieved of this, the appellant-assessee went on appeal before the Commissioner of Income Tax (Appeals). The first appellate authority



took the view that till 9th July 1986, the appellant was not the owner of the property, that the ownership could not be transferred by mere possession of the immovable property without a document registered to its name. Hence, the appellant could not be held to be the owner holding the property for more than 36 months to treat the sale as resulting in long-term capital gains. Thus the appellate authority rejected the plea of the assessee. On further appeal by the appellant assessee, the Tribunal took a view that the assessee had its agreement for sale under document dated 16.9.1975 and possession was handed over to the appellant herein on 1.1.1976. The sale deed in favour of the appellant herein was registered on 26.9.1986 pursuant to the compromise memo recorded in the suit proceedings before the Original Side of this Court. The appellant-assessee, in turn, sold the property on 30.9.1986. The Tribunal viewed that as per the law then stood, the transaction could be treated as transfer only on the registration of the document and part-performance could not be treated as transfer. The Tribunal held that the definition of "transfer" under Section 2(47) was amended to include even part-performance under Section 53-A of the Transfer of property Act, 1882, only on and from 1.4.1988. Hence, only from the date when the sale was executed and registered that the appellant-assessee could be held to be having the title to sell the property. Thus taking this view, the Tribunal upheld the orders of the authorities below holding the gains as short-term capital gains.

27. Learned counsel appearing for the appellant pointed out that the appellant had entered into an agreement for purchase of the property on 16.9.1975. He was put in possession as early as 1.1.1976. Hence, going by the decision of the Calcutta High Court reported in 117 ITR 525 (CIT Vs. ALL INDIA TEA & TRADING CO. LTD.) and the possessory right in terms of the agreement for sale, the claim could not be considered as a short-term capital gains to deny the benefit of set off. Learned counsel for the appellant also pointed out that when the vendor refused to go ahead with the agreement entered into, a suit was filed before this Court on the Original Side in C.S.No.710 of 1980 for a relief of specific performance. Ultimately, the dispute resulted in a settlement in the appeal, whereby, the vendor agreed to execute the sale deed on a consideration of Rs.45 lakhs as against the original consideration. In terms of the agreement, the sale deed was executed and registered on 30.9.1986. Learned counsel pointed out that since the right is traceable to the original agreement, the claim of the appellant-assessee has to be seen from the date of the original agreement.

28. Per contra, learned Senior Standing Counsel appearing for the Revenue submitted that it is an admitted fact that the original agreement entered into in the year 1975 underwent changes as regards the consideration. Hence, there was a novation of contract and the fresh sale agreement was entered into and registered on 30.9.1986. Hence, the right of the appellant-assessee has to be worked out from the date the document was executed and registered in favour of the appellant. Viewed thus, the



claim could be nothing but a short-term capital asset giving rise to short-term capital gains.

29. A perusal of the documents filed before this Court shows that admittedly, the appellant-assessee was put in possession and enjoyment of the suit property as agreement holder right from 1.1.1976. The suit for specific performance was filed by the appellant- assessee herein before the original side of this Court and in terms of the compromise memo filed in the suit, a decree was passed on 30.9.1983 in favour of this appellant. It is no doubt true that as part of the settlement terms, the parties agreed to revise the sale consideration. However, the same was done with reference to the claim under the agreement. The sale deed was executed in terms of the settlement reached in the suit proceedings. As such, there was no novation of contract to result in a fresh agreement entered into.

30. On the question as to whether a possessory right under this agreement, per se, confers an interest to claim long-term capital gains, we may have to look at the definition provisions relating to "Capital Asset" under Section 2(14), "Short Term capital asset" under Section 2(42A) and 'Transfer' under Section 2(47) of the Income Tax Act, 1961. The relevant provisions necessary for the purpose of our consideration are as follows:

Section 2(14) "Capital Asset":

"capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession.."

Section 2(42A) "Short Term capital asset":

Short term capital asset means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer: ... "

Section 2(47) 'Transfer':

"Transfer" in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset;
or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; (or)

The following clause was inserted under Finance Act, 1987 with effect from 1.4.1988:

(v) any transaction involving the allowing of the



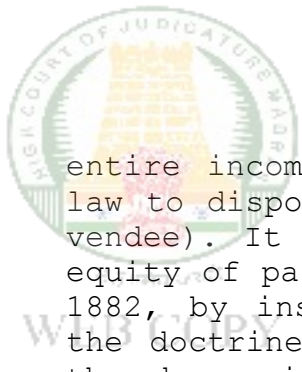
possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

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31. A conjoint reading of the provisions, as they stood at the material assessment year, show that "capital asset" means "property of any kind held" by the assessee. It may be seen that the Income Tax Act, 1961, does not contain the definition of "property". In the decision reported in 76 ITR 471 (AHMED G.H. ARIFF Vs. COMMISSIONER OF WEALTH-TAX), in the context of the Wealth Tax proceedings with reference to the definition of "Assets" in Section 2(e) to "include property of any description", the Apex Court held that 'property' is a term of the widest import and, subject to any limitation which the context may require, it signified every possible interest that a person can hold or enjoy. The definition of "capital asset" under the Income Tax Act, referring to "property of any kind" carry no words of limitation. The definition is of wide amplitude to include every possible interest that a person may hold and enjoy. The meaning ascribed by the Apex Court to the term "property" applies with equal force to the understanding of "capital asset" under the provisions of the Income Tax Act.

32. The definition of "capital asset" refers to property of any kind "held" by an assessee. In contradistinction to the word "owner" or "owned", the definition uses the phrase "held".

33. Touching on the meaning of the term "owner" in the context of assessability of the income from property under Section 22, in the decision reported in 226 ITR 625 (C.I.T. Vs. PODAR CEMENT PVT. LTD.), the Apex Court held that "Owner is the person who is entitled to receive income from the property in his own right." The Apex Court held that in the context of Section 9 of the 1922 Act, the owner must be a person "who can exercise the rights of owner not on behalf of the owner, but in his own right." The Apex Court pointed out to the amendment to Section 27 under the Finance Bill, 1987, to get over an obvious omission to the meaning of the word "owner" under Section 22 that even though in common law, "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law under the Transfer of Property Act and the Registration Act, having regard to the ground realities and the object of the Act, namely, to tax income, in the context of Section 22, the owner is the person who is entitled to receive income from the property in his own right. Adverting to the provisions of the Transfer of Property Act under Section 53-A, 54 and 55, the Apex Court held that legal title does not pass unless there is a deed of conveyance duly registered. Referring to the effect of Section 54, and Section 22 of the Income Tax Act, the Apex Court said "That, however, would not take away the right of the assessee to remain in possession of the property, to realise and receive the rents and profits therefrom and to appropriate the

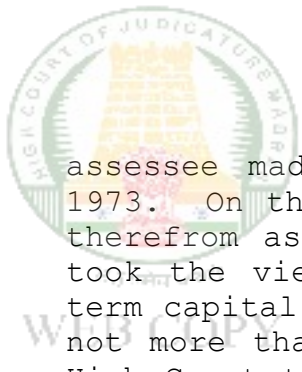


entire income for its own use. The so-called vendor is not permitted in law to dispossess or to question the title of the assessee (the so-called vendee). It was for this very practical purpose that the doctrine of the equity of part performance was introduced in the Transfer of Property Act, 1882, by inserting section 53A therein. The section specifically allows the doctrine of part performance to be applied to the agreements which, though required to be registered, are not registered and to transfers not completed in the manner prescribed therefor by any law. The section is, therefore, applicable to cases where the transfer is not completed in a manner required by law unless such a non-compliance with the procedure results in the transfer being void." Affirming the view of the Rajasthan High Court, the Apex Court held that in the context of Section 22, where the transferor had handed over possession of the property pursuant to an agreement for sale, "owner is a person who is entitled to receive income from the property." The Apex Court held that the amendment introduced by the Finance Bill, 1987, was declaratory/clarificatory in nature and hence, these provisions are retrospective in operation.

34. The Rajasthan High Court had an occasion to consider a case similar to the one that we have on hand. Applying the aforesaid decision of the Apex Court to the case dealing with a question of capital gains where possession was given to an agreement holder, in the decision reported in 259 ITR 724 (C.I.T. Vs. VISHNU TRADING AND INVESTMENT CO.), the Rajasthan High Court held "Following the view taken by their Lordships, we are of the view that for taxing the capital gain, registration of the sale deed is not necessary under the provisions of the Income-Tax Act." The said decision of the Rajasthan High Court was again followed in the decision reported in 260 ITR 503 (C.I.T. Vs. RAJASTHAN MIRROR MANUFACTURING CO.) .

35. Again, in the decision reported in 234 ITR 140 (M.SYAMALA RAO Vs. C.I.T.), the Andhra Pradesh High Court considered the situation, where, under the agreement of sale on the 1st May 1962, the assessee was put in possession of the land. The document of sale was registered on 8th June 1979. The assessee sold the land after converting it into plots. The sale of these lands was sought to be assessed as capital gains. On a reference, the Andhra Pradesh High Court held that though the document was registered on June 8 1979, it related back to the date on which the agreement of sale was executed in favour of the assessee by the vendor. Hence, the assessee was deemed to be the owner of the property with effect from 1962. The Andhra Pradesh High Court pointed out that the assessee had held property for more than 36 months; hence, the capital gains could not be assessed as short-term capital gains.

36. Similar is the view expressed by the Punjab & Haryana High Court on the scope of Section 2(42-A) of the Income Tax Act, 1961, in the decision reported in 207 ITR 148 (C.I.T. Vs. VED PARKASH AND SONS (HUF)). There, the assessee entered into an agreement for purchase of a flat in the year 1970. He was put in possession of the flat in the same year. The



assessee made a final payment in the year 1973, i.e., on February 10, 1973. On the same day, he sold the property and claimed the gain arising therefrom as long-term capital gains. The Punjab and Haryana High Court took the view that Section 2(42-A) relating to the definition of short-term capital gains asset refers to a capital asset held by an assessee for not more than 36 months immediately preceding the date of transfer. The High Court took the view that "As is clear from a bare reading of section 2(42) of the Act, the word "owner" has designedly not been used by the Legislature. The word "hold", as per dictionary meaning, means to possess, be the owner, holder or tenant of (property, stock, land). Thus, a person can be said to be holding the property as an owner, as a lessee, as a mortgagee or on account of part performance of an agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of "owner". As per the Shorter Oxford Dictionary, edition 1985, "owner" means one who owns or holds something; one who has the right to claim title to a thing."

37. The High Court held that even if the amount was not paid in full by the assessee in terms of the agreement, it could not be construed that the assessee had no right or interest in the property. The assessee was put in possession as early as 1970 and was remaining in occupation as a matter of right. Thus for all purposes, he was a beneficial owner from the start. In the context of this view taken, the Court held that the capital gain was assessable as long-term capital gain.

38. We find no reason to differ from the view taken by the other High Courts as stated above on the scope of Section 2(47) with reference to the liability under Section 45. Although the decision of the Apex Court related to a case of income assessability at the hands of an occupier who need not be an owner in the normal connotation, yet, given the scope of the definition provisions under Section 2(14) and Section 2(47) and the effect of the amendment brought forth by the insertion of Clause (v) under Section 2(47), we agree with the view expressed by other High courts.

39. Learned Counsel for the respondent submitted that in the context of the decision of the Apex Court reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX), referred to above, the period of holding the property has to be reckoned from the date of passing of title.

40. This decision was considered by this Court in the decision reported in 254 ITR 175 (MECCANE INDUSTRIES LTD. Vs. C.I.T.), that transfer meant effective conveyance of capital asset to the transferee. It may be noted that the case reported in 254 ITR 175 (MECCANE INDUSTRIES LTD. Vs. C.I.T.), related to the Assessment Year 1968-69. This Court held that the delivery of possession of immovable property could not, by itself, be treated as equivalent to conveyance of the immovable property.



This Court held that having regard to the law that prevailed in the assessment year concerned, capital gains could be regarded only when the conveyance was executed and not at any earlier point of time.

41. The decision of this Court reported in 254 ITR 175 (MECCANE INDUSTRIES LTD. Vs. C.I.T.), no doubt, applied the law declared by the Apex Court reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX) that capital gain arose in the year in which the deed was registered. However, it must be noted that the decision is distinguishable as the same was with reference to the chargeability under Section 45 with reference to "transfer" as defined under Section 2(47) as it then stood prior to the amendment under the Taxation Laws Amendment Act, 1984 with effect from 1.4.1985. Hence, it does not cover the issue on hand.

42. In the decision reported in 271 ITR 269 (ZUARI ESTATE DEVELOPMENT AND INVESTMENT CO. PVT. LTD. Vs. J.R.KANEKAR), the Bombay High Court considered the effect of Section 2(47) which was amended from 1.3.1988. The Bombay High Court held that for the transaction to amount to "transfer" within the meaning of Section 2(47), the minimum requirements are that there has to be an agreement between the parties signed by the parties; it should be in writing; it should pertain to transfer of property and the transferee should have taken possession of the property. Referring to the decision reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX) with reference to Section 12-B of the Act of 1922, it pointed out that "transfer" for the purposes of the Income Tax Act, 1961, require facts of conveyance of the capital assets to the transferee. Delivery of possession of immovable property, by itself, could not be treated as equivalent to conveyance of the immovable property.

43. The decision of the Supreme Court reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX) on which the Tribunal based its decision and relied on by the revenue is to be understood with reference to Section 12-B of the Indian Income Tax Act, 1922. and in the context of the provisions as they stood at the material time.

44. The provisions of Section 12-B of the Indian Income Tax Act, 1922, which corresponds to Section 45 of the 1961 Act relating to capital gains liability brought to charge capital gains "in respect of any profits or gains arising from sale, exchange, relinquishment or transfer of a capital asset...". The 1922 Act contained a definition of "capital asset" under Section 2(4-A). However, there was no specific provision therein corresponding to Section 2(47) under the 1961 Act defining "transfer". The present provision under Section 2(47) defining "transfer" is wider in scope and is an inclusive definition. Touching on the scope of Section 12-B, the Apex Court held "Before Section 12-B can be attracted, title must pass to the company by any of the modes mentioned in Section 12-B, i.e., sale, exchange or transfer. It is true that the word



"transfer" is used in addition to the word "sale" but even so, in the context, "transfer" must mean effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of the immovable property."

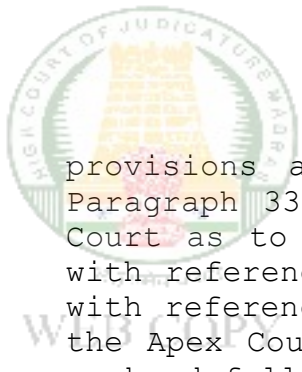
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45. A reading of Section 45 as it stands today, show that capital gains is chargeable on "any profits or gains arising from the transfer of the capital asset...". Read in the context of the definitions of "capital asset" and "transfer" the Section carries no words of limitation to read that a transfer effected by a person backed up with a title passed on under a registered deed alone could be considered as resulting in a profit or gain assessable under Section 45. All that the present Section looks at is the transfer of a capital asset held as understood under Section 2 (14) and under Section 2(47). In the background of the provisions as they stand today, the decision reported in 254 ITR 175 (MECCANE INDUSTRIES LTD. Vs. C.I.T.) relating to the assessment year 1968-69, or for that matter, the decision of the Supreme Court reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX), can have no relevance to the issue in the matter of understanding the scope of Section 2(47) and Section 45. As already seen, the case on hand has to be analysed in the context of the provisions prevailing during the relevant point of time. In the circumstances, we do not agree with the view taken by the Tribunal, applying the decision of the Apex Court in the decision reported in 57 ITR 185 (ALAPATI VENKATARAMIAH Vs. COMMISSIONER OF INCOME TAX) and the decision of this Court reported in 254 ITR 175 (MECCANE INDUSTRIES LTD. Vs. C.I.T.).

46. The question then is, what will be the effect of the amendment brought forth to Section 2(47) by the insertion of sub clause (v) to Section 2(47) relating to the definition of "transfer" under the Finance Act 1987 with effect from 1.4.1988.

47. This takes us once again to the decision of the Apex Court reported in 226 ITR 625 (C.I.T. Vs. PODAR CEMENT PVT. LTD.).

48. As already seen, the decision of the Apex Court was concerned on the meaning of "owner" with reference to Section 22. Yet, the construction given to the amendment effected under the Finance Act of 1987 to Section 2(47) is of relevance to the case on hand. Given the interpretation of the term "property" and that assessee having possession of a property pursuant to an agreement made has also to be construed as "owner" for the limited purpose of Section 22, the Apex Court held that the insertion of Section 53-A of the Transfer of Property Act to Section 2 (47) could only be viewed as declaratory of what was already there and intended. Touching on the scope of Section 27 of the Income Tax Act, brought forth under the Finance Bill of 1987, the Apex Court held "We have, therefore, no hesitation to hold that the amendment introduced by the Finance Bill, 1987, was declaratory/clarificatory in nature so far as it relates to section 27(iii), (iiia) and (iiib). Consequently, these



provisions are retrospective in operation." We have already noted in Paragraph 33 of this judgment the discussion in the decision of the Apex Court as to the provisions of the Transfer of Property Act, particularly with reference to Section 53-A, 54 and 55. Although the said decision is with reference to the scope of Section 22 of the Act, yet the decision of the Apex Court on the scope of the Finance Bill of 1987 covers the issue on hand fully. The definition under Section 2(47) is an inclusive Section which starts by saying "transfer in relation to the capital asset includes"; as such, it is not possible to accept the stand of the respondent that the transactions falling under Section 53-A of the Transfer of Property Act for the purpose of considering the capital gains would fall for consideration for the purpose of considering the same as falling under long term capital asset only on and from the amendment inserted under the Finance Act, 1987, with effect from 1.4.1988. In the light of the decision of the Apex Court already noted, the insertion is only declaratory of the law already there by reason of inclusive terms under Section 2(47) which is a wide definition in its import. In the circumstances, we are in entire agreement with the view expressed by the decision of the Punjab and Haryana High Court reported in 207 ITR 148 (C.I.T. Vs. VED PARKASH AND SONS (HUF)), the decisions of the Rajasthan High Court reported in 259 ITR 724 (C.I.T. Vs. VISHNU TRADING AND INVESTMENT CO.) and 260 ITR 503 (C.I.T. Vs. RAJASTHAN MIRROR MANUFACTURING CO.) as well as the decision of the Andhra Pradesh High Court reported in 234 ITR 140 (M.SYAMALA RAO Vs. C.I.T.), that the capital gain arising on the transfer of capital assets has to be worked out from the date of the agreement under which the assessee was put in possession of the property. The reasoning of the Tribunal, consequently, cannot be upheld. The fact that the sale consideration had undergone a change by reason of a compromise ultimately entered into in the suit proceedings does not result in a novation of a contract. The compromise entered in the suit is itself with reference to the rights arising under the agreement entered into in 1975 under which the assessee was put in possession. Consequently, we have no hesitation in setting aside the order of the Tribunal insofar as the decision of the Tribunal is concerned on the capital gains arising on the sale of the property. We hold that the assessment has to be made treating the gain as long-term capital gains arising out of the sale of the immovable property at 35, Nungambakkam High Road, Chennai. The relief, hence, has to be worked out in terms of the above-said view that we have expressed.

49. In the light of the view that we have taken, our conclusion is as follows:

On the question Nos. 1 to 4, the order passed by the Tribunal is confirmed. We do not find any ground to interfere with the findings arrived at by the Tribunal based on materials and record. However, on the fifth question on capital gains on the sale of the immovable property, we answer the question in favour of the assessee reversing the order of the Tribunal.



50. In the circumstances, the Tax Case (Appeal) stands partly allowed. No costs.
sl/ksv

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. THE ASSISTANT REGISTRAR, INCOME
TAX, APPELLATE, TRIBUNAL, RAJAJI BHAVAN, III FLOOR, BESANT NAGAR, ;
CHENNAI-90.

2. THE DY.COMMISSIONER OF INCOME
TAX, SPL.RANGE VI, 122, UTHAMAR GANDHI SALAI, NUNGAMBAKKAM,
MADRAS-34

3. THE DEPUTY COMMISSIONER OF
INCOME TAX, SPL RANGE VII, MADRAS-34

4. THE COMMISSIONER OF INCOME TAX APPELS-VII,
MADRAS.

+ One cc to Mr. V.S. Jayakumar, Advocate sR 64295
+ One cc to Mr. N. Muralikumaran, Advocate sR 63643
RA (co)
sg 06/11/07

Judgment in
T.C.(A) No.45 of 2004
Delivered on:23.10.2007